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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1051

JACK SOLONER, President, ROBERT C. BRENNAN, Secretary-Treasurer, and AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 492, *Petitioners,*

v.

ROBERT A. GARTNER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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January 26, 1968.

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The petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 1, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, dated September 1, 1967, is reported in 384 F. 2d 348 and is reproduced in Appendix A hereto, p. 1a, *infra.*

The findings of fact, discussion and conclusions of law of District Judge Luongo of the United States District Court for the Eastern District of Pennsylvania, entered on February 28, 1966, and his ensuing order entered on April 18, 1966, are not reported. They are reproduced in Appendix B hereto, p. 20a, *infra*.

JURISDICTION

The final order of the District Court, based upon earlier findings of fact, discussion and conclusions of law, was entered on April 18, 1966. The opinion and judgment of the Court of Appeals for the Third Circuit, reversing the judgment of the District Court to the extent that it held that counsel fees could not be awarded to the respondent, Gartner, was entered on September 1, 1967. A timely filed petition for rehearing was denied by the Third Circuit on October 30, 1967. This petition for writ of certiorari was filed within 90 days of that denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412, which authorizes civil actions in federal district courts "for such relief (including injunctions) as may be appropriate" by individuals whose rights under Title I of the Act have been infringed, permits an award of counsel fees incurred in a successful prosecution of such an action.

STATUTORY PROVISIONS INVOLVED

Section 102 of the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. § 412:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

STATEMENT OF THE CASE

The specific and narrow issue involved in this petition arose out of the following circumstances:

The respondent Robert A. Gartner is an employee of National Biscuit Company and is a member of Local 492, American Bakery & Confectionery Workers International Union, AFL-CIO. In 1961, as a member of a minority group within the Local, the respondent protested alleged denials of the members' voting rights in connection with an election of officers held by Local 492. He picketed the Local's offices, carried placards that disparaged certain Local officers, and allegedly exhibited bad faith in seeking the investigative aid of the International Union and the United States Department of Labor.[1] J.A. 10a-11a.

Thereafter, upon duly filed charges and after a hearing, the Executive Board of Local 492 found the respondent guilty of unauthorized picketing and fined him $50; he was also found guilty of bad faith in seeking the assistance of the International Union and the Department of Labor and fined $25. For both of these

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[1] The Bureau of Labor-Management Reports conducted an investigation and concluded that no violation of law occurred which might have affected the outcome of the Local's election. J.A. 10a.

offenses he was suspended from the union for a period of one year. J.A. 11a. The respondent refused to pay these fines; as a result, his appeal to the International Union was denied. J.A. 11a.

The respondent then brought a civil action in 1963 in the United States District Court for the Eastern District of Pennsylvania under § 102 of Title I of the Landrum-Griffin Act, technically known as the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531. The respondent there sought to enjoin the petitioners' actions in fining and suspending him from membership and to enjoin them from depriving him of his rights as a member of Local 492 in good standing. He also sought damages under the Act, together with "counsel fees, costs and all other expenses necessarily incurred by plaintiff in connection with this action". J.A. 7a.

On July 3, 1963, District Judge Wood entered a preliminary injunction vacating respondent's suspension from membership in Local 492 and directing the Local and its officers to take no action depriving respondent of his right to attend and participate in Local 492 membership meetings or otherwise depriving him of his rights as a member in good standing. J.A. 9a-15a. In issuing this injunction, Judge Wood ruled that the respondent had stated a claim under § 101(a)(2) of the Act, 29 U.S.C. § 411(a)(2),[2] and that he was entitled to express his opinions by advertising his beliefs

[2] Sec. 101(a)(2) of the Act provides that every member of a labor organization "shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions . . .," conditioned only on the labor organization's right "to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . ."

on the picket line; his contacts with the International Union and the Department of Labor were held not to evidence bad faith. J.A. 13a-14a. The court thereupon concluded that the suspension and fining of the respondent were in violation of §§ 101(a)(2) and 609 of the Act, 29 U.S.C. §§ 411(a)(2) and 529.[3] J.A. 14a.

The matter subsequently came on for final hearing before District Judge Luongo, who on February 28, 1966, made permanent the prior temporary injunction. J.A. 36a-43a; Appendix B hereto, pp. 20a-27a, *infra*. The court concluded that the suspension and fining of the respondent were in violation of §§ 101(a)(2) and 609 of the Act, 29 U.S.C. §§ 411(a)(2) and 529, and that he would be irreparably harmed if the preliminary injunction were not made permanent. But District Judge Luongo denied respondent's request for punitive damages. He also denied the request for reimbursement for amounts expended "for legal services in securing reinstatement to membership in the Union or for wages lost while attending Union hearings or court proceedings". J.A. 43a; see p. 27a, *infra*. The denial of such counsel fees was premised exclusively upon the provisions of § 102 of the Act, 29 U.S.C. § 412, which authorizes suits of this nature "for such relief (including injunctions) as may be appropriate."

The Court of Appeals for the Third Circuit, by a divided 2-1 vote, reversed that part of the District Court judgment holding that as a matter of law counsel

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[3] Section 609 of the Act, 29 U.S.C. § 529, makes it unlawful for any labor organization or officer thereof "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section."

fees could not be awarded a successful plaintiff in this type of action. The term "appropriate relief", as used in § 102, was said, when "fairly construed", to include proper counsel fees. District Judge Nealon dissented, finding no Congressional language or authorization for reimbursement of counsel fees in these circumstances.

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit involves an important and recurring question in the interpretation and application of the most frequently invoked section of the Landrum-Griffin Act. And by ruling that counsel fees can be awarded a successful plaintiff in an action under § 102 of the Act, the Third Circuit has reached a result in conflict with all prior federal court decisions on that issue and in conflict with the legislative history of § 102. Even more importantly, the Third Circuit has contradicted and confused several principles of statutory interpretation regarding the award of counsel fees in federally created causes of action, as enunciated by this Court only last Term in *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U.S. 714.

For these various reasons, elaborated below, the appropriateness of reviewing the judgment below becomes most compelling.

1. The Decision Below Conflicts With and Confuses the Principles Recognized by This Court in the Fleischmann Case.

In *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, this Court ruled that in a trademark infringement suit under § 35 of the Lanham Act counsel fees are not recoverable by a successful plaintiff without specific statutory warrant therefor. In so ruling, the

Court recognized that the historic American rule "has long been that attorney's fees are not ordinarily recoverable in the absence of statute or enforceable contract providing therefor." 386 U.S. at 717. And that rule was held to be decisive in the interpretation and application of the federal statute there involved. There being no express provision in § 35 of the Lanham Act authorizing the recovery of counsel fees, and the legislative history indicating that none was intended, the Court ruled that the right to recover such fees "should not readily be implied," 386 U.S. at 720, from any equitable or other inherent power possessed by a federal court.

The decision of the Third Circuit in the instant case not only is at war with several aspects of the *Fleischmann* ruling but has created various problems as to the scope and meaning of the principles utilized therein:

(1) Contrary to the *Fleischmann* approach to the problem of statutory interpretation, the Third Circuit "readily . . . implied" from the general language of § 102 of the Landrum-Griffin Act judicial power to award counsel fees to a successful plaintiff. It did so by reading into the § 102 language—which merely empowers federal district courts to grant "such relief (including injunctions) as may be appropriate"—a power that in the Third Circuit's words "is practically unlimited in view of the courts' legal and equitable jurisdiction." See p. 13a, *infra*.

But § 35 of the Lanham Act, which was under consideration in *Fleischmann,* was even more susceptible to the Third Circuit's device of broad incorporation of a court's equitable powers. That section provided,

"subject to the principles of equity," for the recovery of profits, damages and "the costs of the action". And by reference to the federal court's recognized power "to do equity in a particular situation," *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 166, it was urged that an award of attorney's fees could be supported as a necessary equitable power exercisable under § 35.

But the whole point of the *Fleischmann* ruling was that such general equity powers do not normally authorize the award of counsel fees "in the context of statutory causes of action for which the legislature has prescribed intricate remedies," 386 U.S. at 719, and where such an award is not expressly ordained. Only "when overriding considerations of justice seemed to compel such a result," said this Court, 386 U.S. at 718,[4] can a general equitable power to award counsel fees be read into a court's administration of a federal cause of action. No such "overriding considerations" were found present in *Fleischmann.*

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[4] The only "overriding considerations of justice" mentioned in *Fleischmann* which in the past have justified the award of counsel fees are (386 U.S. at 718-719):

(1) An award of counsel fees in "appropriate circumstances" to an admiralty plaintiff as an item of compensatory damages. *Vaughan* v. *Atkinson,* 369 U.S. 527.

(2) An award of fees in a civil contempt action, occasioned by willful disobedience of a court order, as part of the fine to be levied on the defendant. *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399, 426-428.

(3) An award of counsel fees, to be paid by those benefiting from a common fund created by the plaintiff's efforts, where those benefiting would otherwise be unjustly enriched at plaintiff's expense. *Sprague* v. *Ticonic National Bank,* 307 U.S. 161.

None of those considerations are any more present in the instant case than they were in *Fleischmann.*

Here, the Third Circuit, which cited the general equitable power of federal courts as recognized in the *Sprague* case, purported to find an overriding consideration justifying the award of counsel fees in the assertion that Congress could not have intended to "slam the door" on the aggrieved union member's right to vindicate his statutory "bill of rights" under § 102 "when confronted with the insurmountable obstacles of prohibitive legal expenses." See p. 15a, *infra.*

But is that the kind of "overriding consideration" that *Fleischmann* indicated might overcome the traditional rule against the award of counsel fees in the absence of specific statutory authorization? Whenever Congress has created privately-enforceable rights must it be assumed that it meant to invoke the equitable power of the judiciary so that those rights might be vindicated free of legal expense? Or, in the context of the Landrum-Griffin Act, can it be said that, despite its silence, Congress intended that labor unions finance the legal costs of those members who sue to redeem their personal rights under Title I? These are among the questions posed by the Third Circuit's assumption that "overriding considerations" precluded application of the *Fleischmann* rule to § 102 of this Act. They are questions that deserve consideration and answer by this Court.

(2) The Third Circuit further ruled, see pp. 13a, 14a (fn. 12), *infra.*, that § 102 of the Landrum-Griffin Act is "not of the limiting type found in *Fleischmann*" and is "not the type of statutory cause of action that prescribes 'intricate remedies' "—hence, it was said not "to restrict recovery to those remedies which are expressly set forth in the statute." The court thought that the language of § 102, empowering the award of

"such relief (including injunctions) as may be appropriate," provides a flexibility whereby legal and equitable power may be exercised in "practically unlimited" fashion.

But does the *Fleischmann* ruling mean to limit the search for a statutory scheme of "intricate remedies," for purposes of applying the historic rule against the award of counsel fees, to those specific remedies spelled out in the particular section of a statute under which suit is brought? Or does the stretch of "intricate remedies" encompass the entire statute under consideration?[5]

Even if § 102 be viewed in isolation, it is questionable whether the "appropriate relief" there authorized justifies anything more than substantive relief in the nature of injunctions, damages, accountings and declaratory judgments, as distinguished from peripheral relief such as costs, expenses or counsel fees.[6] But when the entire Landrum-Griffin Act is viewed, a careful and explicit set of "intricate remedies" becomes evident.

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[5] In *Fleischmann*, this Court referred not only to § 35 of the Lanham Act in defining the "intricate remedies" but also to § 34 thereof and generally to "the Lanham Act." 386 U.S. at 719, particularly fn. 12.

[6] Congress used the phrases "appropriate relief" and "such relief (including injunctions) as may be appropriate" no less than six times in the Landrum-Griffin Act. See §§ 102, 104, 210, 304(a), 501(b). In three instances, §§ 104, 210, 304(a), the phrase "such relief (including injunctions) as may be appropriate" identifies the type of relief which the Secretary of Labor alone may seek, relief which plainly would not encompass counsel fees incurred by the Secretary if such there be. And in one instance, § 501(b), union members may recover damages or secure an accounting "or other appropriate relief," *plus* "the fees of counsel" and "any expenses" of the litigation.

A union member's suit under § 102 is but one of the "intricate remedies" afforded such private individuals under the Act; see also §§ 201(c), 304(a), 501(b). Among the other "intricate remedies" for vindication of the legislative policies are not only various criminal sanctions but specified civil remedies allowable only to the Secretary of Labor. See, e.g., §§ 104, 210, 304(a), 402(b). And perhaps most relevant of all is the fact that in two instances and only in two instances—not including § 102—Congress has specifically mentioned counsel fees as being recoverable by a successful private litigant. See §§ 201(c), 501(b).[7]

The Third Circuit's concept of what this Court meant in *Fleischmann* by "intricate remedies" in a federal statute generates an obvious need for further consideration and clarification of the problem by this Court.

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[7] Under § 201(c), a union member may sue to enforce the labor organization's duty to make available certain specified information and records; and the court may, "in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Under § 501(b), a union member may sue an officer or agent of the labor organization "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization" where such organization has refused or failed to sue those officers who have violated their fiduciary obligations. In such a suit, the court "may allot a reasonable part of the recovery . . . to pay the fees of counsel . . . and to compensate such members for any expenses" incurred in connection with the litigation.

In both these instances Congress plainly distinguished counsel fees from the judgment or relief accorded the plaintiff on the substantive aspects of his complaint.

2. The Decision Below as to the Recoverability of Counsel Fees in a § 102 Proceeding Is in Conflict With All Prior Federal Court Rulings.

In every recorded instance where the issue has been raised, other lower federal courts have viewed § 102 as depriving them of power to award counsel fees to a successful plaintiff.

Most of these decisions have been rendered by federal district courts. Thus, in *Cole* v. *Hall,* 35 F.R.D. 4, 8 (E.D. N.Y.), the court ruled that "no basis for such a claim [for counsel fees] exists under the Act, . . . When Congress intended to include counsel fees in a plaintiff's recovery, it did not hesitate to express itself as it did in Section 501(b) of Title V of the Act. No such similar provision appears in Title I." In *Vars* v. *International Brotherhood of Boilermakers,* 215 F. Supp. 943, 952 (D. Conn.), the court after reviewing the legislative history of § 102 concluded that "In its wisdom Congress refrained from including attorney's fees as an item of damages . . . Counsel fees and expenses are not compensable damages and are hereby denied." And in *McCraw* v. *United Ass'n of Journeymen,* 216 F. Supp. 655, 664 (E.D. Tenn.), the court denied counsel fees in a § 102 proceeding on the ground that the legislative history "reflects that the Bill [Act] was so interpreted at the time of its enactment" and that the court was "therefore without jurisdiction to award attorney fees on this phase of the lawsuit." See also, to the same effect, *Jacques* v. *Local 1418,* 246 F. Supp. 857 (E.D. La.); *Leonard* v. *M.I.T. Employees' Union,* 225 F. Supp. 937 (D. Mass.); *Magelssen* v. *Local*

Union 518, 240 F. Supp. 259 (W.D. Mo.); *Bailey* v. *Netter,* 266 F. Supp. 165 (E.D. La.)[8]

Two of the foregoing district court decisions were affirmed on appeal. The Second Circuit affirmed the *Vars* decision, but did not discuss the question of counsel fees. 320 F. 2d 576. But the Sixth Circuit, in affirming the *McCraw* ruling, expressly recognized the lower court ruling that there was no jurisdiction to award attorney's fees on the § 102 phase of the case and gave implied approval to that ruling. 341 F. 2d 705 at 710. Such approval, of course, directly conflicts with the Third Circuit's action in the instant case.

The Third Circuit here purported to find judicial sanction for its conclusion in *Johnson* v. *Nelson,* 325 F. 2d 646 (C.A. 8). But the *Johnson* case, as the court below was forced to acknowledge in footnote 3 of its opinion (see p. 7a, *infra*), arose under § 501(b) of the Act, which contains express authority for the award of counsel fees when a union member sues to enforce an officer's fiduciary obligations. The *Johnson* ruling has no relevance to a § 102 proceeding.

The unanimity of other judicial authority as to the lack of power to award counsel fees under § 102 attests to the serious conflict created by the Third Circuit and to the need for resolution of that conflict by this Court. It is a conflict made even more manifest by the dissenting views of Judge Nealon in this case. See p. 16a, *infra.*

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[8] See, generally, Annotation, Prevailing Union Member's Right to Recover Attorneys' Fees in Action Against Union or Union Officers, 9 A.L.R. 3d 1045.

3. The Decision Below Raises Important Problems of Statutory Analysis.

The Third Circuit, in its interpretation and analysis of § 102, has utilized techniques that are highly questionable and that deserve most careful review by this Court.

The court below, of course, had to concede that § 102 contains no express provision authorizing the award of counsel fees. It further conceded "that some members of Congress wished to provide expressly for counsel fees under Section 102" (p. 9a, *infra*) and that dissenters from the version of § 102 finally adopted were extremely critical of its failure to permit such a fee recovery (see pp. 7a-8a, *infra*). As Senator Goldwater complained, § 102 "does not grant him [the union member], even where successful in his suit, reasonable counsel fees or other costs. It thus forces him to assume the entire financial burden of the litigation." Legislative History of the Act, Vol. II, p. 1281 (N.L.R.B. ed.).

Yet the Third Circuit brushed aside the clear omission from § 102 of any provision for counsel fees with the suggestion that the legislative intent to provide broad legal and equitable relief under § 102 necessarily encompassed the right to award counsel fees. Such an analysis is highly suspect on several grounds:

(1) The legislative drafters of the Landrum-Griffin Act obviously knew of the possibility and appropriateness of permitting the award of counsel fees. As the court below noted, such an award was considered for inclusion in § 102 and yet consciously was omitted. In two other sections of the Act, §§ 201(c) and 501(b), provision was expressly made for such an award. In

such circumstances, the failure to include counsel fees in the relief authorized by § 102 must be given great and probably controlling significance. The Third Circuit's speculations (see pp. 15a-16a, *infra*) as to the appropriateness and need of awarding counsel fees in this situation can hardly do service for what Congress deliberately omitted.

(2) Congress must be presumed to be aware of what this Court in *Fleischmann* referred to as the historic American rule against the award of counsel fees in statutory causes of action in the absence of express authorization. And the mere fact that Congress provided for broad and unidentified forms of "appropriate relief" in § 102 cannot, in view of the considerations set forth in the *Fleischmann* opinion, be read as indicative of a legislative intent to repeal the historic rule and to rely exclusively upon a court's feeling that "overriding considerations of justice" compel the award of counsel fees. Nor should such a broad reference to "appropriate relief" entitle a court, as the Third Circuit has done, to ignore the *Fleischmann* rationale and to read into those broad words a judicial authorization to provide a remedy Congress did not see fit to provide.

(3) The entire pattern of the Landrum-Griffin Act, involving a scheme of "intricate remedies," demonstrates a careful legislative delineation of those circumstances or causes of action where recovery of counsel fees was thought appropriate and where it was thought not appropriate. As was noted in the *Fleischmann* opinion, 386 U.S. at 720-721, Congress has with some frequency and in a wide spectrum of federal legislation "selectively provided a similar remedy [recovery of counsel fees] in connection with various other statutory

causes of action." That legislative history of selectivity with respect to such a remedy should militate against implying this remedy where Congress has not clearly spoken.

(4) The general rule against implying a remedy not provided for by Congress should apply most forcefully with respect to private causes of action created by statute. Whatever the justification for reading broad powers into the hands of a public official charged with enforcing a statutory policy, see *Porter* v. *Warner Holding Co.*, 328 U.S. 395, and *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n.*, No. 57, Oct. Term, 1967 (decided January 15, 1968), the remedies available to a private litigant should be more strictly construed, consistent with the legislative intent and traditional rules of construction. Especially should such a strict construction be favored where, as here, the remedy made available by implication would tend to encourage more federal court litigation, including much that is without merit.

(5) Since the Act represents a coordinated series of limited and specific intrusions upon the internal affairs and freedoms of labor unions, rather than a wholesale and general transfer to the courts of the internal operations of labor organizations,[9] a court should hesitate to expand the sanctions Congress made available with respect to such statutorily authorized intrusions. Without some express legislative language permitting recovery of counsel fees, therefore, it should not lightly

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[9] "The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions." *Gurton* v. *Arons*, 339 F. 2d 371, 375 (C.A. 2).

be assumed that Congress intended to add to the limited statutory obligations of labor organizations by imposing on them the potential obligation to pay all counsel fees of those union members whose private rights under Title I have been judicially vindicated and otherwise made whole.

The Third Circuit has in effect amended the plain language of § 102 without legislative authorization. It has done so by questionable interpretative means. That judicial amendment, involving as it does a most important piece of federal legislation, should be carefully examined and reviewed by this Court. Without such a review, the decision below will likely become a most dubious yet influential precedent, perpetuating a remedy which no element of legislative intent or statutory analysis can justify.

4. The Question Raised Is an Important and Recurring One in the Administration of the Act.

The importance of the question as to the recoverability of counsel fees and the appropriateness of the grant of certiorari are heightened by the fact that countless pending and potential lawsuits by union members under § 102 of the Act are affected by this problem. Section 102, creator of Title I litigation, is probably the most prolific source of private litigation under the Act, making the question here presented a constantly recurring one. As has been said by the Office of the Solicitor of the Department of Labor,[10]

> "Since September 14, 1959, the effective date of the Act, there have been approximately 850 pri-

[10] Letter dated October 25, 1967, to Alan R. Howe, Esq., one of counsel for petitioners, and signed by George T. Avery, Esq., Associate Solicitor, Office of the Solicitor, U.S. Department of Labor, Washington, D. C.

vate actions filed under the first six titles of the L.M.R.D.A. While this office does not maintain a listing of these cases according to the particular titles involved, we estimate that 650 were filed under Title I, 30 under section 201(c) and 50 under section 501(b)."

Until the question is settled authoritatively by this Court, therefore, confusion and uncertainty will mark the counsel fee aspect of this multitudinous litigation. The interests of uniform and certain administration of this important provision of the Act make the grant of certiorari most compelling.

CONCLUSION

For these various reasons, certiorari should issue to review the judgment below.

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APPENDIX